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# Assessing the Constitutionality of Legislation: Constitutional Review in Taiwan's Legislative Yuan

Brian Christopher Jones\*

## Abstract

*This article examines the constitutional interpretative authority of Taiwan's Legislative Yuan, while incorporating international viewpoints on constitutional review, primarily from the United Kingdom and the United States. It contends that Taiwan possesses an over-reliance on legal constitutionalism and strong judicial review, which hinders the Legislative Yuan's interpretative authority. Author interviews from Legislative Yuan insiders demonstrate that lawmakers and staffers may not actively be thinking about the constitutionality of the bills they are presenting and that they possess few, if any, official consultation options when seeking advice on constitutional questions. In essence, the interviews displayed clear evidence of judicial overhang. The article further argues that constitutional review by legislatures is an inherent good and provides multiple avenues for the Legislative Yuan to increase their constitutional interpretative authority. It also calls for more nominations to Taiwan's Constitutional Court to be made from members with elected political experience and for the Court to acknowledge (at some level) the legislature's interpretative authority. After all, democratic constitutional structures are dynamic and Taiwan's governmental branches should work to bridge the divide between legal and political constitutionalism, before the former becomes even more firmly entrenched.*

## I. Introduction

Democracies often tinker with mechanisms of constitutional governance. One of the current topics debated regarding such mechanisms is how involved legislatures should be in the constitutional assessment of laws. While some jurisdictions display strong

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parliamentary authority with weak judicial review (for example, the United Kingdom ('UK')), others incorporate strong judicial review with decreased legislative or parliamentary authority (for example, the United States ('US')). Yet no matter the governmental structure, it is now widely held that most legislatures have the capacity and authority to perform at least some constitutional review of bills and statutes, however limited or extensive.<sup>1</sup> As Vermeule states, '[c]onstitutional interpretation in representative legislatures must lie near the core of any account of democratic deliberation'.<sup>2</sup> Many jurisdictions have taken steps to address the legislature's capacity to interpret the constitution—that is, by increasing constitutional deliberation—and also by assessing the fit of legislation with constitutions, statutes and international conventions.

Underlying principles of constitutional review are questions of governance, especially in regard to legal and political constitutionalism and how countries go about balancing such standards. Essentially the question becomes one of 'precisely how the government should be held to account',<sup>3</sup> and where supremacy lies: with the legislature or the judiciary.<sup>4</sup> Some jurisdictions put more faith in courts and judicial review, while others

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<sup>1</sup> See generally P Brest, 'The Conscientious Legislator's Guide to Constitutional Interpretation' (1975) 27 *Stanford Law Review* 585; WF Murphy, 'Who Shall Interpret? The Quest for the Ultimate Constitutional Interpreter' (1986) 48 *Review of Politics* 401; L Fisher, *Constitutional Dialogues: Interpretation As Political Process* (Princeton University Press, Princeton, 1988); B Ackerman, *We The People, Volume 1: Foundations* (Harvard University Press, Cambridge, 1993); M Tushnet, *Taking The Constitution Away from the Courts* (Princeton University Press, Princeton, 1999); J Waldron, *Law and Disagreement* (Oxford University Press, Oxford, 1999); J Waldron, *The Dignity of Legislation* (Cambridge University Press, Cambridge, 1999); E Garrett and A Vermeule, 'Institutional Design of a Thayerian Congress' (2000–2001) 50 *Duke Law Journal* 1277; N Devins and L Fisher, *The Democratic Constitution* (Oxford University Press, Oxford, 2004); N Devins and KE Whittington (eds.), *Congress and the Constitution* (Duke University Press, Durham, 2005); A Vermeule, *Mechanisms of Democracy* (Oxford University Press, Oxford, 2007).

<sup>2</sup> Vermeule (note 1, above), p 217.

<sup>3</sup> M Elliott and R Thomas, *Public Law*, (Oxford University Press, Oxford, 2011), p 38.

<sup>4</sup> R Bellamy, 'Political Constitutionalism and the Human Rights Act' (2011) 9 *International Journal of Constitutional Law* 86 at 89.

put more faith in governmental institutions and the political process, although ‘[q]uite sensibly, few countries put all of their eggs in one basket’.<sup>5</sup>

This article focuses on Taiwan, who may indeed have all of their eggs in one basket.<sup>6</sup> Taiwan’s Constitutional Court (or ‘Council of Grand Justices’) incorporates strong judicial review and the legislature has limited formal mechanisms by which to assess the constitutionality of the bills and laws it scrutinises. Although Taiwan officially operates on a Presidential system, in reality it is more of a hybrid between parliamentary and presidential (that is, ‘semi-presidential’).<sup>7</sup> Lately there have been calls to officially change the system to a Parliamentary model, but little movement on this has occurred.<sup>8</sup> Nevertheless, Taiwan’s Constitutional Court takes a firm position as the state’s sole provider of highly centralised constitutional review,<sup>9</sup> and statistics back this up. From 1994–2013 the Court declared 95 acts, or more specifically provisions of particular acts, unconstitutional,<sup>10</sup> amounting to 39 percent of the constitutional challenges to laws and acts they have decided.<sup>11</sup> To put this in perspective, in a span of two centuries (1803–2002), the US Supreme Court only declared 158 Congressional acts, or provisions of acts,

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<sup>5</sup> Elliott and Thomas (note 3 above), p 21. Emphasis added.

<sup>6</sup> Ginsburg notes that constitutional review is exclusively carried out by the Council of Grand Justices (T Ginsburg, *Judicial Review in New Democracies* (Cambridge University Press, Cambridge, 2003), p 116). While lower courts can hear constitutional cases and refuse to apply regulations or other secondary measures they deem unconstitutional, only the Constitutional Court can strike down statutes.

<sup>7</sup> CF Lo, *The Legal Culture and System of Taiwan*, (Kluwer, Netherlands, 2006), p 4.

<sup>8</sup> C Wang, ‘DPP Cautious on Parliament Model, but Debate Needed’, *Taipei Times*, 20 May 2014.

<sup>9</sup> See Ginsburg (note 6 above), pp 115–144. See also CC Lin, ‘The Birth and Rebirth of the Judicial Review in Taiwan—Its Establishment, Empowerment, and Evolvment’ (2012) 7 *National Taiwan University Law Review* 157 at 198–209.

<sup>10</sup> Institutum Iurisprudentiae Academia Sinica (IIAS), Taiwan Constitutional Court (TCC) Database (2015), available at <http://www.els.iias.sinica.edu.tw/iias/public/>. However, 40 of the 95 acts declared unconstitutional from 1994–2013 were enacted (or went into effect) before the Legislature was fully democratically elected in 1992.

<sup>11</sup> *Ibid* From 1994–2013, there were 244 cases regarding laws/acts before the court. The court ruled 131 (53.69%) constitutional, 95 (38.93%) unconstitutional and 18 (7.38%) neither constitutional nor unconstitutional.

unconstitutional.<sup>12</sup> Thus, within two decades, Taiwan's Constitutional Court has gone two-thirds of the way to what took the US Supreme Court two centuries to achieve. Furthermore, challenging and striking down legislative provisions does not appear to be abating: in 2013, the Constitutional Court declared eight laws, or provisions of laws, unconstitutional.<sup>13</sup>

Here it is contended that Taiwan is currently too heavily focused on legal constitutionalism, thus hindering the constitutional assessment of bills travelling through the legislative process. This over-focus on legal constitutionalism was seen in the author's interviews with lawmakers and staffers of the Legislative Yuan, presented below. Though formal and practical barriers stand in the way, Taiwan's legislature possesses the necessary means by which to increase the institution's constitutional interpretative authority, should the body choose to do so. In fact, legislatures in democratic systems may well demand such an increase in authority.<sup>14</sup>

The article unfolds in the following manner. First, it briefly discusses the complexities of comparing law-making systems, noting differences between Taiwan's constitutional structure and the other institutions consulted in this article. Next, it talks about constitutional review generally and interpretive authority for legislatures specifically, focusing on the UK Parliament, the US Congress and other legislatures. Then, it incorporates an empirical component, using interview material obtained from Taiwanese Legislative Yuan insiders to address whether and how lawmakers and their staff think about

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<sup>12</sup> A 2002 Government Printing Office document tracked how many acts (and provisions) the Supreme Court of the United States (SCOTUS) has struck down through 2002. It is available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-10.pdf>. Importantly, however, this figure is only in relation to Acts of Congress and does not include state laws, which would significantly increase the total.

<sup>13</sup> IIAS TCC Database (note 10 above). Also, there were only 12 petitions regarding such cases that year, which means that the court struck down laws 66% of the time.

<sup>14</sup> Vermeule (note 1 above), p 217.

and assess the constitutionality of the laws they are drafting and voting on. Finally, the article offers proposals on how to enhance the interpretative authority of the Legislative Yuan, with the hope of striking more of a balance between legal and political constitutionalism.

Before this, however, a short note on the paper's comparative methodology is in order. At times this article incorporates methods and ideas from other jurisdictions, such as the UK and US. This is no accident. In the face of what many consider a stronger judiciary,<sup>15</sup> Westminster has set up a Constitution Committee and a Joint Committee on Human Rights ('JCHR') that have been extremely successful, and are widely acknowledged as vanguard models of legislative deliberation and authority as regards constitutional issues.<sup>16</sup> Further, the standards and practices located in American law and constitutional review continue to have a large influence on Taiwanese adjudication.<sup>17</sup> While it is acknowledged that such legislatures operate in different constitutional structures, the main focus of this article is constitutional deliberation and review. All democratic legislatures can attempt to increase their constitutional interpretative authority, and Taiwan's is no different.<sup>18</sup> Searching for ideas is a matter of legal borrowing, in which law and legal institutions have a rich history.<sup>19</sup> Such borrowing is certainly apparent in

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<sup>15</sup> See notes 25 and 26 below.

<sup>16</sup> M de Visser, *Constitutional Review in Europe* (Hart, Oxford, 2014) pp 29–32, 83.

<sup>17</sup> Lo (note 7 above), p 3; LSL Liu, 'Judicial Review and Emerging Constitutionalism: The Uneasy Case for the Republic of China on Taiwan' (1991) 39 *American Journal of Comparative Law* 509 at 511, 515–516; See also N Chisolm, 'The Faces of Judicial Independence: Democratic Versus Bureaucratic Accountability in Judicial Selection, Training, and Promotion in South Korea and Taiwan' (2014) 62 *American Journal of Comparative Law* 893.

<sup>18</sup> Garrett and Vermeule (note 1 above), p 1292: 'It seems indisputable that, on net, some congressional deliberation on constitutional questions is better than none at all. The real question is not whether deliberation is beneficial, but how much deliberation is optimal'.

<sup>19</sup> A Watson, *Legal Transplants: An Approach to Comparative Law* (2<sup>nd</sup> ed, University of Georgia Press, Athens, 1993), p 107.

Taiwan's Legislative Yuan.<sup>20</sup> Taiwan borrows legal rules and statutes from across the globe—its legal system and constitutional review structure are a collection of various Japanese, US and European (predominately German) customs.<sup>21</sup> Further, constitutional interpretative authority does not have to appear in statutory or constitutional (amendment) form—ideas other legislatures have implemented in regard to the practice may fit well with the Legislative Yuan or may motivate the Yuan to adopt similar or more innovative methods.

## **II. The Dynamic Nature of Constitutional Review**

### ***A. Overview***

Maartje de Visser notes that '[d]eciding on the institutional arrangements to enforce the supremacy of a constitution is often regarded as a veritable evergreen of constitutional law'.<sup>22</sup> Indeed, even in stable democracies, constitutional arrangements appear to constantly be changing.<sup>23</sup> Questioning such arrangements is in fact part of the democratic process. Assessing whether a constitutional structure is properly working, however, is much more difficult to determine.

Examples regarding the dynamic nature of constitutional structures arise in the jurisdictions consulted in this article. The UK currently operates on a system based around

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<sup>20</sup> During interviews the author also asked insiders about statutory borrowing. Many acknowledged the Legislative Yuan frequently did so, especially from (in no particular order) the US, UK, Germany and Japan.

<sup>21</sup> Lo (note 7 above), p 12; Ginsburg (note 6 above), pp 108 and 110; see also T Tetzlaff, 'Kelsen's Concept of Constitutional Review Accord in Europe and Asia: The Grand Justices in Taiwan' (2006) 1 *NTU Law Review* 75.

<sup>22</sup> de Visser (note 16 above), p 1.

<sup>23</sup> D Oliver and C Fusaro (eds.), *How Constitutions Change: A Comparative Study* (Hart, Oxford, 2013), p 4.

parliamentary supremacy and judges are not allowed to strike down acts of parliament.<sup>24</sup> Yet many believe judicial review and legal constitutionalism has strengthened in the UK since passage of the Human Rights Act 1998,<sup>25</sup> or has gotten stronger for other reasons.<sup>26</sup> During this period of constitutional change, or perhaps in response to it, the Westminster Parliament inserted mechanisms to increase their constitutional assessment procedures of pending legislation, establishing two separate constitutional committees (one in the Commons<sup>27</sup> and one in the Lords),<sup>28</sup> and also adding the JCHR.<sup>29</sup> Ultimately, however, there remains little question that the Westminster Parliament ‘has the final say on the compatibility of its laws with the UK constitution’.<sup>30</sup>

Conversely, in the US judicial review of statutes played no role in constitutional review until *Marbury v Madison*.<sup>31</sup> Subsequent to this expansive decision, the Supreme Court refused to strike down an act of Congress for over half a century.<sup>32</sup> Yet nowadays it is common for the Court to strike down laws or specific provisions, as the powers of judicial review have been thoroughly strengthened. Congress has been much less

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<sup>24</sup> Although courts can now issue ‘statements of incompatibility’ with statutes that violate the Human Rights Act 1998.

<sup>25</sup> Bellamy (note 4 above), p 87; Elliott and Thomas (note 3 above), pp 38–41; D Oliver, ‘United Kingdom’, in Oliver and Fusaro (eds.) (note 23 above), pp 342 at 350–352.

<sup>26</sup> From an American perspective, see EF Delaney, ‘Judiciary Rising: Constitutional Change in the United Kingdom’ (2014) 108 *Northwestern University Law Review* 543.

<sup>27</sup> House of Commons Political and Constitutional Reform Committee.

<sup>28</sup> In regard to the House of Lords (‘HOL’) Constitution Committee, see A Le Sueur and J Simson Caird, ‘The Lords Constitution Committee’, in A Horne, G Drewry and D Oliver (eds.), *Parliament and the Law*, (Hart, Oxford, 2013), pp 281–308.

<sup>29</sup> In regard to the JCHR, see M Hunt, ‘The Joint Committee on Human Rights’, in Horne, Drewry and Oliver (eds.), *ibid*, pp 223–250; P Norton ‘A Democratic Dialogue? Parliament and Human Rights in the United Kingdom’ (2013) 21 *Asia Pacific Law Review* 141.

<sup>30</sup> de Visser (note 16 above), p 83.

<sup>31</sup> 5 U.S. 137 (1803). According to Thayer the Supreme Court did not strike down an act by a state legislature until 1814 (JB Thayer, ‘The Origin and Scope of the American Doctrine of Constitutional Law’ (1893) 7 *Harvard Law Review* 129 at 134).

<sup>32</sup> See Government Printing Office, *Acts of Congress Held Unconstitutional in Whole or in Part by the Supreme Court of the United States*, available at <http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2002/pdf/GPO-CONAN-2002-10.pdf>.



successful implementing constitutional legislative scrutiny mechanisms, and this could be one reason why strong judicial review has expanded significantly throughout the country's history.<sup>33</sup> Contrary to this judicial review uprising, during the past couple of decades a wave of constitutional scholars have advocated that legislatures—and citizens, more generally—play an increased role in the constitutional assessment of laws.<sup>34</sup>

However some scholars may disagree with America's constitutional structure being characterised as heavy on legal constitutionalism and strong judicial review. For example, Eskridge and Ferejohn contend that the US is largely 'a republic of statutes'.<sup>35</sup> They further argue the written constitution is becoming increasingly obsolete and the Supreme Court 'does not have the legitimacy, the wisdom and the expertise, or the enforcement resources to generate important changes in the Constitution'.<sup>36</sup> Garrett and Vermeule also cite a long list of significant constitutional dimensions the Court leaves under Congressional surveillance, and therefore declines to review.<sup>37</sup> Among these are: the procedural validity of constitutional amendments; the procedural validity of enacted statutes; the creation and validity of internal congressional rules; economic and social regulation; spending for the general welfare; delegation of rulemaking authority to Executive or agencies; division of war powers between Congress and the Executive; rules and regulations for the military;

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<sup>33</sup> For comprehensive accounts on the rise of judicial supremacy, see eg KE Whittington, *Political Foundations of Judicial Supremacy* (Princeton University Press, Princeton, 2007); B Friedman and EF Delaney, 'Becoming Supreme: The Federal Foundation of Judicial Supremacy' (2011) 111 *Columbia Law Review* 1137.

<sup>34</sup> See note 1 above.

<sup>35</sup> WN Eskridge Jr and J Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale University Press, New Haven, 2010).

<sup>36</sup> *Ibid*, p 4.

<sup>37</sup> See Garrett and Vermeule (note 1 above), pp 1284–1285.

confirmations and impeachments; and enforcement of the ‘Republican Form of Government’ clause.<sup>38</sup>

Other jurisdictions present contemporary examples of how constitutional review structures regularly fluctuate. In 2003 Belgium’s *Cour d’arbitrage* gained powers to ‘control whether statutes comply with all the fundamental rights and liberties laid down in the constitution’ and other legal principles;<sup>39</sup> France amended its constitution in 2008 to allow for increased judicial review of promulgated laws;<sup>40</sup> and controversially, Hungary has recently adopted a Fundamental Law that significantly curbs the powers of its constitutional court.<sup>41</sup> Other democracies such as Canada,<sup>42</sup> Germany<sup>43</sup> and Switzerland<sup>44</sup> have experienced various levels of constitutional change over the past few decades, tinkering with structures to discover their ‘veritable evergreen’.<sup>45</sup> Such change, however, need not be dramatic. Minor adjustments to such constitutional mechanisms can also play a significant part in review.<sup>46</sup> After all, democracies are dynamic entities, and all-or-nothing review by one branch of government—or merely one governmental entity—is not how such review usually functions,<sup>47</sup> and would challenge the principles of democratic governance.

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<sup>38</sup> *Ibid*

<sup>39</sup> de Visser (note 16 above), p 57.

<sup>40</sup> *Ibid*, pp 60–61.

<sup>41</sup> *Ibid*, pp 74–75. Although this move has been heavily criticised both within Hungary and abroad.

<sup>42</sup> Oliver and Fusaro (eds.) (note 23 above), pp 9–10. Canada’s Supreme Court has ‘created unwritten yet justiciable constitutional principles’, including ‘a provision that disallows the unilateral secession of a province’. And Canada’s Parliament has created legislation that allows the provinces veto power over some constitutional amendments.

<sup>43</sup> *Ibid*, p 145. Germany amended the federal system in 2006 and 2009, and made further constitutional amendments permitting the ratification of the Lisbon Treaty in 2009.

<sup>44</sup> *Ibid*, p 303. Switzerland’s third Constitution came into force on 1 January 2000, 125 years after their second constitution.

<sup>45</sup> de Visser (note 16 above), p 1.

<sup>46</sup> Vermeule (note 1 above), p 2: ‘The fact is that in most democratic polities, the basic constitutional arrangements are no longer up for grabs. ...small scale institutional design is all that is on offer’.

<sup>47</sup> Elliott and Thomas (note 3 above), p 20.

## ***B. Legislative interpretative authority***

Most theories of constitutionalism acknowledge the legislature's interpretative authority, although such power varies by jurisdiction.<sup>48</sup> That being said, de Visser writes that the study of parliamentary constitutional interpretation is 'still in its infancy'.<sup>49</sup> Parliamentary or congressional scrutiny of constitutional issues can arise or be supported because of many different rationales. In some cases this stems from a pledge by lawmakers upon taking office to uphold the constitution,<sup>50</sup> actively scrutinising the constitutionality of bills travelling through parliament (for example, the Westminster Parliament's Lords Constitution Committee) or even merely from the duty of enacting bills into laws.<sup>51</sup> Inevitably legislators are constitutional actors; but unfortunately, sometimes they are not viewed as constitutional reviewers.

Often the primary issue with enhanced constitutional scrutiny by legislatures is the complex interplay with the responsibilities of the judiciary.<sup>52</sup> This is especially true in jurisdictions employing strong judicial review and a reliance on legal constitutionalism. Here legislatures are more likely to be stymied by the judiciary or impede themselves regarding their constitutional review efforts, rather than be aided by the judiciary as to how

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<sup>48</sup> Garrett and Vermeule (note 1 above), p 1306: 'Normatively, most mainstream theories of constitutionalism deem congressional review for constitutionality to be an affirmative good, regardless of the scope of subsequent judicial review'.

<sup>49</sup> de Visser (note 16 above), p 23.

<sup>50</sup> HM Volokh, 'Constitutional Authority Statements in Congress' (2013) 65 *Florida Law Review* 177 at 183–184; see also R Feingold, 'Upholding an Oath to the Constitution: A Legislator's Responsibilities' (2006) *Wisconsin Law Review* 1.

<sup>51</sup> de Visser (note 16 above), p 23, writes: 'Parliament as a whole must work within constitutional limits when performing its functions. This notably entails that constitutional rules, principles and values are respected during the drafting and enactment of new statutes'.

<sup>52</sup> See GJ Jacobsohn, 'An Unconstitutional Constitution? A Comparative Perspective' (2006) 4 *International Journal of Constitutional Law* 460 at 463.

improvement could be made or responsibilities shared. Nonetheless, for jurisdictions that continue to employ strong judicial review, the ‘countermajoritarian difficulty’ ominously lingers.<sup>53</sup>

Another issue is whether legislators feel the need for constitutional assessment of legislation and whether they perform adequately if such opportunities arise. Brest famously argues that ‘[o]ne can reasonably demand ... that the lawmaking process take explicit account of constitutional values threatened by pending legislation’.<sup>54</sup> Compared to writings on the countermajoritarian difficulty,<sup>55</sup> there is a dearth of research regarding how legislators feel about constitutional assessment and how well they perform such duties; yet there is some. After comparing two Congressional surveys (one from 1959 and another from 1999/2000), Peabody found that ‘Congress expresses a persistent and surprising interest in asserting a distinctive constitutional voice’.<sup>56</sup> Particularly important is the emergence of a new group of ‘joint constitutionalists’ in the 1999/2000 survey, who believe that ‘Congress and the courts should each interpret the Constitution conscientiously and independently, without necessarily deferring to the views of the other’.<sup>57</sup> Further, Tushnet has found Congressional interpretation of constitutional issues to be ‘reasonably good’,<sup>58</sup> and notes it may be the case that the ‘imperfect congressional capacity to interpret the

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<sup>53</sup> Sometimes ‘bemoaned as the “central obsession” of constitutional scholarship’: EC Dawson, ‘Adjusting the Presumption of Constitutionality Based on Margin of Statutory Passage’ (2013) 16 *University of Pennsylvania Journal of Constitutional Law* 97 at 100.

<sup>54</sup> Brest (note 1 above), at 588.

<sup>55</sup> See generally AM Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (2nd ed, Yale University Press, New Haven, 1986) and the copious amounts of literature this work has spawned.

<sup>56</sup> BG Peabody, ‘Congressional Attitudes Toward Constitutional Interpretation’, in Devins and Whittington (eds.) (note 1 above), p 40. Yet the author goes on to note, ‘although it has somewhat conflicted and underdeveloped views about how to achieve this aspiration’.

<sup>57</sup> *Ibid*, p 50.

<sup>58</sup> M Tushnet, ‘Evaluating Congressional Constitutional Interpretation: Some Criteria and Two Informal Case Studies’, in Devins and Whittington (eds.) (note 1 above), pp 269–270.

Constitution is nonetheless better than the perhaps more imperfect judicial capacity to do so'.<sup>59</sup> Yet many legislators and constitutional scholars continue to assert the case for judicial supremacy in regard to constitutional questions.<sup>60</sup> This is most often expressed in jurisdictions with strong judicial review and could have much to do with the effects of judicial overhang.

### ***C. Judicial overhang***

One of the circumstances resulting from strong judicial review and an over-focus on legal constitutionalism is the development of judicial overhang. Coined by Mark Tushnet, this occurs when legislators give ultimate constitutional deference to the courts, believing they will correct statutory mistakes.<sup>61</sup> To some extent this development could promote disregard for the Constitution, as legislators and others may not 'bother to interpret the constitution at all, much less interpret it well'.<sup>62</sup> Ultimately Tushnet observes many pitfalls arising from this phenomenon.

First, he states it promotes irresponsibility, in that legislators do not feel responsible for constitutional assessment<sup>63</sup> and lawmakers may simply defer to the judiciary on major constitutional issues. As will be seen below, this type of thinking was apparent in the author's interviews with Legislative Yuan members. Next, Tushnet believes it distorts legislation—if legislators focus too much on the Constitution inside the courts, they may

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<sup>59</sup> M Tushnet, 'Is Congress Capable of Conscientious, Responsible Constitutional Interpretation?' (2009) 89 *Boston University Law Review* 499 at 500.

<sup>60</sup> See eg E Chemerinsky, 'In Defense of Judicial Review: The Perils of Popular Constitutionalism' (2004) *University of Illinois Law Review* 673; see also L Alexander and F Schauer, 'On Extrajudicial Constitutional Interpretation' (1997) 110 *Harvard Law Review* 1359 at 1377.

<sup>61</sup> Tushnet (note 1 above), p 57; see also Tushnet (note 59 above).

<sup>62</sup> Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton University Press, Princeton, 2009), p 81.

<sup>63</sup> *Ibid.*

produce unsatisfactory laws.<sup>64</sup> Lawmakers should focus more on policy, not on the Supreme Court or court-centred laws. The policy is the heart of the law and that should not be discarded. Tushnet further contends that judicial overhang distorts legislative discussion<sup>65</sup> and could make lawmakers think in scrutiny levels (that is, strict scrutiny versus rational basis), and not in terms of fairness. He also writes that the US Executive Branch does a fair job of interpreting the constitution because of particular offices it houses, advocating that legislatures should try to develop these specialised offices as well.<sup>66</sup> Finally, Tushnet believes judicial overhang misleads legislators, in that they may think their constitutional discussion should be similar to Supreme Court discussion.<sup>67</sup> Yet the Constitution's text and the court cases surrounding it are not the only source of constitutional rights (for example, the right to privacy, not found in the US Constitution, has been advocated by the courts and also by the legislature). In fact, Tushnet argues that legislative discussion of the right to privacy 'gave a firmer basis to such rights than the Court's own decisions'.<sup>68</sup>

Baxter takes the problems of judicial overhang further, noting that it 'is not just a problem of metrics for those who would determine Congress's capacity for constitutional interpretation. It is also, more importantly, a circumstance that likely prevents Congress from developing its capacity'.<sup>69</sup> He further notes that '[r]eference to constitutional issues

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<sup>64</sup> *Ibid*, p 58. Emphasis in original.

<sup>65</sup> *Ibid*, pp 60–63.

<sup>66</sup> *Ibid*, pp 61–62. Here Tushnet cites the Office of Legal Counsel in the Department of Justice. Meanwhile, Ackerman also writes about this phenomenon, noting the establishment of the Office of Legal Counsel and the White House Counsel 'have vastly increased [Executive] constitutional authority', although he heavily criticises them: B Ackerman, *The Decline and Fall of the American Republic* (Harvard University Press, Cambridge, 2010), pp 68, 87–88, 95–110.

<sup>67</sup> Tushnet (note 62 above), pp 63–65.

<sup>68</sup> *Ibid*, p 65.

<sup>69</sup> H Baxter, 'A Comment on Mark Tushnet's Some Notes on Congressional Capacity to Interpret the Constitution' (2009) 89 *Boston University Law Review* 511.

and concerns is a necessary, but not sufficient, criterion for adequate constitutional analysis. Having ‘the Constitution and constitutionalism in mind’ is not enough’.<sup>70</sup> Baxter’s criticisms coincide with this article’s main points: that Taiwan relies too heavily on judicial review and this is stifling constitutional discussion and scrutiny in the Legislative Yuan.

#### ***D. Legislative Yuan interpretative authority and the dominance of Taiwan’s Constitutional Court***

Above it was stated that Taiwan exercises strong judicial review with weak parliamentary authority in regard to constitutional matters and it was also noted that the Taiwanese standard of constitutional review has been heavily influenced by America’s. But critical structures of Taiwanese judicial review are much stronger than the US model. As Lo points out, the system of constitutional review in Taiwan is more similar to Germany and Austria.<sup>71</sup> For one, direct interpretive authority for constitutional matters is not located in the US Constitution; the Court established this power through one of its own decisions.<sup>72</sup> Taiwan’s Constitutional Court contains this authority in abundance, firmly delineated in the Constitution.<sup>73</sup> Further, Taiwan has a separate Constitutional Interpretation Procedure Act that details the procedures for interpretation of the constitution.<sup>74</sup> That law makes no

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<sup>70</sup> *Ibid*, p 512.

<sup>71</sup> Lo (note 7 above), p 17. Although, even the German Constitutional Court was influenced by the American structure of constitutional review and the US Supreme Court (de Visser (note 16 above), p 64).

<sup>72</sup> *Marbury v Madison* 5 U.S. 137 [1803].

<sup>73</sup> See eg articles 78, 171 and 173. Article 78 provides: ‘The Judicial Yuan shall interpret the Constitution and shall have the power to unify the interpretation of laws and orders’; art 171: ‘Laws that are in conflict with the Constitution shall be null and void. When doubt arises as to whether or not a law is in conflict with the Constitution, interpretation thereon shall be made by the Judicial Yuan’; art 173: ‘The Constitution shall be interpreted by the Judicial Yuan’.

<sup>74</sup> Constitutional Interpretation Procedure Act (1993).

mention of Legislative Yuan interpretive power besides their right to petition the Constitutional Court under Article 5(iii) of the Act.<sup>75</sup>

Recall the earlier Elliott and Thomas quote on legal and political constitutionalism, that '[q]uite sensibly, few countries put all of their eggs in one basket'.<sup>76</sup> Contrary to such sensibility, it appears 'unequivocal' that Taiwan has allocated constitutional review exclusively among the 15 staggered, fixed-term Justices of the Constitutional Court.<sup>77</sup> Although statutory and constitutional backing was already strong, throughout the years the Court significantly expanded its power through various decisions, providing further foundations by which judicial supremacy is exercised. Tom Ginsburg<sup>78</sup> and Chien-Chih Lin<sup>79</sup> offer impressively thorough accounts of how the court has expanded its reach, and Chien-Liang Lee interestingly grapples with many of the constitutional review dilemmas arising in Taiwan.<sup>80</sup> Ginsburg notes this was performed in three stages: (1) establishing supremacy over the ordinary courts; (2) challenging governmental authority on administrative law matters; and (3) by avoiding Council Law restrictions. Further, Ginsburg writes that the Court decided to enhance enforcement of their decisions by providing dates for compliance: if such dates are not complied with, the law or regulation in question becomes null and void.<sup>81</sup> Conversely, Lin notes the Court expanded its power

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<sup>75</sup> Article 5(iii) notes that: 'The grounds on which the petitions for interpretation of the Constitution may be made are as follows: ... 3. When one-third of the Legislators or more have doubt about the meanings of a constitutional provision governing their functions and duties, or question on the constitutionality of a statute at issue, and have therefor initiated a petition'.

<sup>76</sup> Elliott and Thomas (note 3 above), p 21.

<sup>77</sup> Judicial Yuan (J. Y.) Interpretation No 499 (24 March 2000), Holding, para 8: 'It is, therefore, unequivocal that the Justices of the Judicial Yuan are charged with the power to interpret the Constitution and unify the interpretation of laws and statutes'.

<sup>78</sup> Ginsburg (note 6 above), pp 134–157.

<sup>79</sup> Lin (note 9 above).

<sup>80</sup> CL Lee, 'A Comparative Study of Judicial Review Procedure Types—The Option of Constitutional Procedure System in Reform of the Constitutional Review of Taiwan' (2010) 5 *NTU Law Review* 73.

<sup>81</sup> Ginsburg (note 6 above), pp 143–144. See also J.Y. Interpretation No 188 (noting that unless otherwise specified, interpretations come into effect immediately).



through two methods: (a) being regarded as a guardian of constitutional and human rights; and (b) unabashedly expanding the scope and validity of their interpretations.<sup>82</sup> However, this power expansion certainly did not develop without backlash from the Legislative Yuan and the Executive.<sup>83</sup>

One relatively recent interaction between the Court and the Legislative Yuan left the latter weakened and the former emboldened. In response to the 319 Presidential assassination attempt the Kuomintang ('KMT') controlled legislature passed an act creating a commission to investigate the incident.<sup>84</sup> The law's constitutionality was questioned by other members of the Legislative Yuan, who petitioned the Court to examine the matter. The Justices found much of the law unconstitutional, thus gutting the 319 commission but upholding the legislature's investigatory powers.<sup>85</sup> In doing so, the Justices emphatically stated they 'will not be bound by the views held by petitioners or agencies concerned as to how the law should be applied'.<sup>86</sup> This passage is similar to the statements made in Interpretation No 216, disregarding the views of Ministry of Justice attorneys on the constitutionality of legislation.<sup>87</sup> But this incident did not end there. KMT legislators were so upset with Interpretation No 585 that in the following budget they deleted the 'specialty premiums' portion of the Justices' salaries.<sup>88</sup> Members of the Legislative Yuan again petitioned the Court and the Justices responded by declaring the salary deletions unconstitutional, asserting that 'no constitutional organ may delete or

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<sup>82</sup> Lin (note 9 above), pp 199–206.

<sup>83</sup> *Ibid*, pp 206–210.

<sup>84</sup> The Act of the Special Commission on the Investigation of the Truth in Respect of the 319 Shooting.

<sup>85</sup> J.Y. Interpretation No 585 (15 December 2004).

<sup>86</sup> *Ibid*.

<sup>87</sup> J.Y. Interpretation No 216 (19 June 1987): 'Judicial administrations shall not put forth their own legal views and order judges to follow such views in the course of adjudication. If any legal views are presented, they are references for judges only and shall not bind judges in the course of adjudication'.

<sup>88</sup> The Justices salaries consist of a base salary, public expenses, and the specialty premiums.

diminish the remuneration for a judge unless there is any ground for discipline'.<sup>89</sup> Subsequently, the Legislative Yuan has been noticeably hesitant to challenge Constitutional Court authority.<sup>90</sup>

That prominent exchange came during a period of rapid power expansion for the Court. In 1990 the Justices struck down a Temporary Provisions constitutional amendment,<sup>91</sup> and a decade later they controversially struck down another constitutional amendment on the grounds of 'improper processes'.<sup>92</sup> The latter was perceived by some as revising, not interpreting, the Constitution.<sup>93</sup> While such negation of constitutional amendments infrequently occurs in democracies, it certainly is not unheard of.<sup>94</sup> Revisions to the Constitution in 2005 gave the Justices power to adjudicate impeachments of the president and to dissolve unconstitutional political parties, two spectacular powers not normally provided to courts in liberal democracies.<sup>95</sup> The Court also exerts a certain irresolute control over the political agenda in Taiwan, which scholars believe was gained in the late 1990s.<sup>96</sup>

Some Constitutional Court interpretations forcefully, almost combatively, articulate the authority of the Constitutional Court.<sup>97</sup> Interpretation No 185 notes that

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<sup>89</sup> J.Y. Interpretation No 601, Holding, para 2.

<sup>90</sup> Although, others note there was an attitude change after J.Y. Interpretation No 530 (in relation to whether the Judicial Yuan may enact trial rules or supervisory regulations on their own): see CT Lee, 'Taiwan's Legislators' Attitude Toward Grand Justices Constitutional Interpretation' (2012) 37 *The Constitutional Review* 488.

<sup>91</sup> J.Y. Interpretation No 261 (21 June 1990); Lin (note 9 above), p 203.

<sup>92</sup> J.Y. Interpretation No 499 (2000).

<sup>93</sup> Lin (note 9 above), p 203.

<sup>94</sup> See eg Jacobsohn (note 52 above), p 460.

<sup>95</sup> However other courts in liberal democracies (eg Germany), do have such powers. The ancillary powers of constitutional courts have risen dramatically since the early 20th century: T Ginsburg and Z Elkins, 'Ancillary Powers of Constitutional Courts' (2009) 87 *Texas Law Review* 1431 at 1440, 1443.

<sup>96</sup> Tetzlaff (note 21 above), p 9; for a more complete description of how the Court's political power was attained, see Lin (note 9 above), pp 186–192.

<sup>97</sup> See note 77 above about the 'unequivocal' nature of their interpretative responsibilities.

‘interpretations of the Judicial Yuan *shall be binding upon every institution and person in the country*, and each institution shall abide by the meaning of these interpretations in handling relevant matters’.<sup>98</sup> Interpretation No 405 notes that Court interpretations are binding ‘*regardless of whether the Interpretations concern the meaning of the Constitution*, are solutions of disputes concerning the applicability of the Constitution or adjudication on the unconstitutionality of statutes’.<sup>99</sup> These are audacious words for a Court that operates in a ‘constitutional democracy’<sup>100</sup> and incorporates such principles as ‘representative politics’, ‘accountability of politics’<sup>101</sup> and ‘legislative autonomy’<sup>102</sup> into their decisions. As the Court made clear in their decision on the unconstitutionality of the 1999 constitutional amendment, ‘not all parliamentary proceedings that are clearly and grossly flawed may take the pretext of being internal, self-regulatory matters and evade their legal consequences’.<sup>103</sup> The meaning of ‘clearly and grossly flawed’, however, obviously comes down to the interpreter; in Taiwan, such discretion is solely in the purview of the Constitutional Court.

Yet recent events may provide some hope for non-judicial interpretation. In 2009 the Legislative Yuan enacted the International Covenant on Civil and Political Rights (‘ICCPR’) and the International Covenant on Economic, Social and Cultural Rights (‘ICESCR’).<sup>104</sup> Surprisingly, judicial review enforcement of the covenants was lacking.

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<sup>98</sup> J.Y. Interpretation No 185 (27 January 1984), Holding, para 1. Emphasis added.

<sup>99</sup> J.Y. Interpretation No 405 (7 June 1996), Reasoning, para 1. Emphasis added.

<sup>100</sup> J.Y. Interpretation No 585 (15 December 2004), Holding 5, para 5.

<sup>101</sup> *Ibid.*, Holding 2, para 4.

<sup>102</sup> J.Y. Interpretation No 342 (8 April 1994), Holding, para 1. This decision notes that the Justices may intervene in legislative procedures if there is an ‘apparent violation’ of the constitution significant enough for them to do so: Lo (note 7 above), p 27.

<sup>103</sup> J.Y. Interpretation No 499, Holding, para 12.

<sup>104</sup> Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (22 April 2009). See WC Chang, ‘An Isolated Nation with Global-

Given the wide substantive nature of both covenants, their enactment may provide the Legislative Yuan and other non-judicial governmental entities with increased constitutional review authority. In particular, the implementing law notes that:

All levels of governmental institutions and agencies should review laws, regulations, directions and administrative measures within their functions according to the two Covenants. All laws, regulations, directions and administrative measures incompatible to the two Covenants should be amended within two years after the Act enters into force by new laws, law amendments, law abolitions and improved administrative measures.<sup>105</sup>

The deadline for reviews by governmental agencies was December 2011 and a December 2012 report by a local NGO states that while some action by the Executive has taken place, ‘the pace of review is clearly lagging behind, for which the executive and the legislature should bear joint responsibility’.<sup>106</sup> The report goes on to single out the Legislative Yuan, explicitly noting its ‘agencies have not been checking for laws or administrative measures that violate the covenants’.<sup>107</sup> While the Legislative Yuan still does not contain any official procedure by which the two covenants are assessed against pending legislation, remedying this situation is discussed in more detail below.

### **III. Legislative Yuan Insider Responses**

#### ***A. Interview details***

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minded Citizens: Bottom-up Transnational Constitutionalism in Taiwan’ (2009) 4 *NTU Law Review* 203 at 211.

<sup>105</sup> Act to Implement the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (22 April 2009), art 8.

<sup>106</sup> Covenants Watch, ‘Taiwan Human Rights Report Parallel Report on the Core Document Forming Part of the Reports’, p 50 (14 December 2012).

<sup>107</sup> *Ibid*, p 51. However the judiciary has increasingly referenced human rights laws more after the statutory ratification of the treaties: WC Chang, ‘The Convergence of Constitutions and International Human Rights: Taiwan and South Korea in Comparison’ (2011) 36 *North Carolina Journal of International Law and Commercial Regulation* 593 at 602.

To examine whether Legislative Yuan insiders actively assess the constitutionality of the bills they are drafting and voting on, the author conducted interviews with Legislative Yuan insiders in the summer and autumn of 2013.<sup>108</sup> In all, he talked with 15 individuals:

- Eight Lawmakers;
- Six Legislative Assistants; and
- One Bureau Drafter

It is acknowledged that 15 individuals is not a representative sample of the Legislative Yuan. However the answers came from a diverse group of professionals with significant institutional experience in Legislative Yuan law-making. Going directly to such insiders provided insight regarding to what extent the legislature assesses the constitutionality of prospective laws, and how legislators and staff were going about this. In addition to others, the author asked two important questions during the interviews:

- (1) When drafting or proposing legislation, do you think about whether the statute is constitutional?
- (2) If you do have questions regarding the constitutionality of a statute, who do you ask, and/or who resolves these matters?

The first question seeks to determine if legislators conscientiously assess constitutionality during the drafting process, while the second asks a more substantive question: where do legislators go with constitutional questions.

### ***B. Thinking about constitutionality***

Some insiders proclaimed to actively think about constitutionality. For instance, one legislator noted, ‘I have more concern on human rights, democracy, and the constitutional

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<sup>108</sup> Most of these interviews were conducted in Chinese via an interpreter. Thus, the original answers have been twice translated from Chinese to English by research assistants and the most logical and accurate compilations were used. Should the original Chinese translations be desired, these can be proffered.

structure or concept of constitutionalism ... so when I propose a bill, I will specifically make sure these concerns are being observed'.<sup>109</sup> A couple of assistants supported this notion, one adding, 'we will find constitutional law or the Grand Judges' interpretation to support our argument',<sup>110</sup> while the other noted, 'Yes, constitutionality is very fundamental, all the assistants and the experts take it into account'.<sup>111</sup>

However, what the author tended to see more with this question was an assumed constitutionality, where insiders took for granted the constitutional content of their proposals. Even though many aspects of Taiwan's Constitution remain exceedingly divisive, one legislator answered, 'Oh, it always has to be within our constitutional framework, yeah—It's not really that controversial. I mean our constitutional principles are quite clear'.<sup>112</sup> Given the rate at which the Constitutional Court has struck down legislation in recent years,<sup>113</sup> it was surprising to hear one assistant state that 'it's impossible for us to present unconstitutional bills ... It's common sense to know whether it's constitutional or not while drafting'.<sup>114</sup> Further, another staffer noted that 'Taiwan has a written law system and we strictly follow the levels of law, Constitutional Law, and other provisions. If the law or the authorising law are unconstitutional, it will be considered a joke'.<sup>115</sup> Given the difficulty of assessing constitutionality in many cases, however, the disparaging of a particular proposal may not necessarily kill it or easily render it illegitimate. Finally, in connection with assumed constitutionality, one assistant stated, 'yes,

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<sup>109</sup> Interview with Legislative Yuan Member No 3 ('LYM3') in Taipei, Taiwan (10 July 2013).

<sup>110</sup> Interview with Legislative Yuan Assistant No 2 ('LYASST2') in Taipei, Taiwan (22 October 2013).

<sup>111</sup> Interview with Legislative Yuan Assistant No 4 ('LYASST4') in Taipei, Taiwan (31 October 2013).

<sup>112</sup> Interview with Legislative Yuan Member No 1 ('LYM1') in Taipei, Taiwan (18 July 2013).

<sup>113</sup> See IIAS TCC database (note 10 above).

<sup>114</sup> Interview with Legislative Yuan Assistant No 6 ('LYASST6') in Taipei, Taiwan (9 October 2013).

<sup>115</sup> Interview with Legislative Yuan Assistant No 3 ('LYASST3') in Taipei, Taiwan (28 October 2013).

we certainly consider this. People working here have legal backgrounds’,<sup>116</sup> while a lawmaker noted ‘[d]ue to my background in politics, constitutional law, and administrative law, I have no difficulty concerning the constitutionality of laws’.<sup>117</sup> Yet having a legal background and actively assessing the constitutionality of legislation are two quite separate things, and one is not necessarily predicated upon the other.

### *C. Where do offices go with constitutional questions?*

Since the initial question focused on how lawmakers perceive themselves as complying with constitutional norms in the legislative and larger legal processes, the second question asked a more structural question in regard to constitutional issues: where legislators (and staff) can go with constitutional questions. A couple of legislators noted they would consult colleagues, friends, and other acquaintances. One said ‘I will seek consultations with my friends in legal circles or even colleagues (at the Legislative Yuan). If necessary, we can seek aid from other experts, but we ourselves could make a sufficient argument’,<sup>118</sup> while another stated, ‘there is a name list in my office, including professors, lawyers and other consultants. So if we or other legislators in my party find there might be some problem with the law, we will invite familiar consultants to offer opinions or even ask what kind of standpoint we should hold in the first and second reading’.<sup>119</sup> Thus, consultation with regard to constitutional issues did happen for some legislators. It is important to point out, however, that these consultations are based on the quality of the individuals those people

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<sup>116</sup> Interview with Legislative Yuan Assistant No 1 (‘LYASST1’), in Taipei, Taiwan (30 October 2013).

<sup>117</sup> Interview with Legislative Yuan Member No 6 (‘LYM6’) in Taipei, Taiwan (17 July 2013).

<sup>118</sup> Interview with LYM3 (note 109 above).

<sup>119</sup> Interview with Legislative Yuan Member No 5 (‘LYM5’) in Taipei, Taiwan (9 July 2013).

were asking and that there is not an ‘official’ office, agency or organisation legislators can consult regarding constitutional questions.

Assistants, however, provided a somewhat different perspective. While one noted their office usually ‘consult[s] law professors’,<sup>120</sup> others presented a disturbing lack of options in regard to exploring constitutional questions. One said, ‘usually we won’t ask’,<sup>121</sup> while another peculiarly added, ‘when a law is unconstitutional, it’s actually not too difficult to understand’.<sup>122</sup> Further, an experienced assistant noted:

Sometimes, legislators do not care about the constitutionality or whether it’s going to pass or not; they care more about media exposure or whether certain groups feel that the legislator is contributing something for them. In our office, we pay much attention to the fundamental constitutional rules as much as possible.<sup>123</sup>

Exhibiting signs of judicial overhang, a few participants displayed overt nods to Taiwan’s Constitutional Court. One staffer suggested that if one doubts the constitutionality of a bill, ‘he or she needs to petition for interpretation, instead of interpreting it on his or her own’.<sup>124</sup> Another lawmaker stated something similar, noting, ‘if we have a very controversial case that means we have to ask the constitutional court, or [if] we have made the law and find that it’s very controversial, or maybe [we] have different opinions among the society or general public, then we can call for the joint proposal from different legislators and then we can send it to the Constitutional Court’.<sup>125</sup> These answers demonstrate the deference that some have for the Constitutional Court and its powerful but passive role in the law-making process.

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<sup>120</sup> Interview with LYASST4 (note 111 above).

<sup>121</sup> Interview with LYASST3 (note 115 above).

<sup>122</sup> Interview with LYASST1 (note 116 above).

<sup>123</sup> Interview with Legislative Yuan Assistant No 5 (‘LYASST5’) in Taipei, Taiwan (12 November 2013).

<sup>124</sup> Interview with LYASST3 (note 115 above).

<sup>125</sup> Interview with Legislative Yuan Member No 7 (‘LYM7’) in Taipei, Taiwan (14 and 26 November 2013).



And yet, among the responses there were also calls for reform. One lawmaker pointedly noted:

It is paramount to check if all the laws conform to the constitution, human rights, and this is especially true after we ratified ICCPR and ICESCR. There should be an organisation to monitor that all the passed law conforms to the standards of constitutions and conventions. However, there is currently no such organisation. We always hope to transform this system.<sup>126</sup>

From the interviewees' answers above it is apparent that Legislative Yuan insiders do not have a well-developed sense of constitutional interpretative authority as bills are travelling through the legislative process. Importantly, the legislature lacks any formal mechanisms that may either enhance constitutional scrutiny or spark constitutional debate and some interviewees displayed overt evidence of judicial overhang. Thus, the following section provides proposals for the Legislative Yuan and the Constitutional Court going forward.

#### **IV. Proposals for the Legislative Yuan and the Constitutional Court**

Below specific recommendations are provided that hopefully increase the Legislative Yuan's interpretative authority, and in doing so, increases Taiwan's political constitutionalism. Three of the proposals solely concern the parliament, while the final suggestions affect the Constitutional Court.

##### ***A. Legislative Yuan proposals***

First, the implementation of a legislative or parliamentary counsel that can aid legislators in drafting and scrutinising legislation should be established. Interviewees revealed that

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<sup>126</sup> Interview with Legislative Yuan Member No 4 ('LYM4') in Taipei, Taiwan (18 July 2013).

they often get outside help for drafting bills, such as from law professors or from NGOs. Although the legislature is relatively young, it was a bit surprising to find the Legislative Yuan without such an office. Other unicameral legislatures, such as the Scottish Parliament<sup>127</sup> and Hong Kong Legislative Council<sup>128</sup> are equipped with such offices. Sometimes the Legislative Research Bureau is mentioned as a comparable organisation, but most of the interviewees made it clear that that office focuses on legislative research, and does not officially engage in aiding legislators with their drafting responsibilities.<sup>129</sup> Parliamentary counsel offices are essential to contemporary legislatures: they professionalise the drafting of bills and laws, aid legislators through the drafting and legislative process,<sup>130</sup> and can even advise legislators on some of the constitutional and policy dimensions of their proposals.<sup>131</sup> Usually composed of trained attorneys, the offices provide highly specialised individuals to aid legislators and their staff in the drafting process. Also, it has been previously noted that such offices help to keep the focus of statutory text on neutral legal language, rather than incorporating overtly political

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<sup>127</sup> See The Scottish Government, Office of the Scottish Parliamentary Counsel, available at <http://www.scotland.gov.uk/About/People/strategic-board/Finance/OSPC>.

<sup>128</sup> HK Law Drafting Division, Department of Justice, *How Legislation is Made in Hong Kong*, available at [http://www.doj.gov.hk/eng/public/pdf/2012/Drafter\\_booke.PDF](http://www.doj.gov.hk/eng/public/pdf/2012/Drafter_booke.PDF).

<sup>129</sup> The Legislative Research Bureau ('LRB') does good work, but they are not a legislative drafting office. They are primarily a research office that reports on the effects or potential effects of legislation. Work from the LRB can be found at [http://www.ly.gov.tw/05\\_orglaw/search/lawSearch.action](http://www.ly.gov.tw/05_orglaw/search/lawSearch.action).

<sup>130</sup> For a description of how the Westminster Parliamentary Counsel operates, see D Greenberg, *Craies on Legislation* (Sweet and Maxwell, London 2012), 5.1.1, pp 225–257.

<sup>131</sup> Daniel Greenberg, *Laying Down The Law: A Discussion of the People, Processes and Problems that Shape Acts of Parliament* (Sweet and Maxwell, London, 2011), pp 19–33; see also R Hazell, 'Who is the Guardian of Legal Values in the Legislative Process: Parliament or the Executive?' (2004) *Public Law* 495 at 495: 'in the absence of a higher law by which a sovereign Parliament is bound, the concept of legal policy as interpreted by Parliamentary Counsel is as close as our system has traditionally come to a check on the 'constitutionality' of legislation'.

language.<sup>132</sup> Creating such an office would bring the legislature in line with many other long-established law-making bodies.

Second, for every proposed bill the Legislative Yuan should require some type of statements of compatibility with the ratified ICCPR and ICESCR. These relatively minor adjustments can be easily made to the standing orders of the Legislative Yuan, and cost little in terms of implementation. Additionally, incorporating such statements could spark debate and get legislators actively thinking about their proposals in terms of constitutional and human rights issues,<sup>133</sup> which was noticeably lacking in the interview data. Taking this step would also demonstrate to Taiwan's Constitutional Court and perhaps even to international organisations (such as the United Nations), that Taiwan's legislature is taking human rights seriously.

Next, a standing or ad hoc Constitutional Committee should be developed in the Legislative Yuan<sup>134</sup> which can discuss and debate significant constitutional issues that arise in the legislative process in regard to bills and other issues. Composition of the committee should be multi-partisan, in that it would be composed of members of each political party and no one political party would have majority powers. Thus, minority views would be actively and overtly heard. The committee could operate on the same principles the Yuan currently does for requesting the Constitutional Court to examine an issue: the 'one-third vote' principle could be the standard for review.<sup>135</sup> Additionally, the committee should not be able to hold legislation back, but merely make recommendations on how it can be

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<sup>132</sup> BC Jones, 'Processes, Standards and Politics: Drafting Short Titles in the Westminster Parliament, Scottish Parliament and U.S. Congress' (2013) 25(1) *Florida Journal of International Law* 57.

<sup>133</sup> Norton writes that the JCHR has made Parliament more sensitive to human rights and has also influenced judicial decision-making: Norton (note 29 above), pp 158 and 162).

<sup>134</sup> There is currently an ad hoc Constitutional Amendment Committee that only convenes when a constitutional amendment is put forward.

<sup>135</sup> Constitutional Interpretation Procedure Act, art 5(iii).

improved, in order to enhance constitutional scrutiny and discussion in the legislative stages. Establishing a committee of this magnitude would place the Legislative Yuan amongst the forefront of legislative bodies that take constitutional scrutiny seriously and would increase constitutional deliberation in the law-making process. While Westminster has two major committees that do this (Lords Constitution Committee, Commons Political and Constitutional Reform Committee), not even the long-established US Congress has a comparable committee that tackles constitutional issues in this manner.

A couple of important admonitions for any attempts at increasing interpretative authority in the Legislative Yuan: change often arrives slowly and respect needs to be earned. If one or more of the recommendations taken above are implemented, such changes (especially those of a parliamentary committee),<sup>136</sup> take time to mature and grow into effective constitutional reviewers and guardians of fundamental rights.<sup>137</sup> However, it should not be forgotten that constitutional change is possible and frequently occurs. Just a decade ago in the UK, the Executive used to be known as the branch that protected legal and fundamental rights in the legislative process. Now it is primarily Parliament that does so, primarily because of the establishment of the JCHR and the Lords Constitution Committee.<sup>138</sup>

### ***B. Constitutional Court appointments and formal acknowledgement of legislative authority***

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<sup>136</sup> Norton's 2013 article demonstrates that such committees can be effective if they actively scrutinise enough legislation and earn the respect of their colleagues, the courts and the government: Norton (note 29 above).

<sup>137</sup> See Le Sueur and Caird (note 28 above), speaking about the evolution of the Lords Constitution Committee.

<sup>138</sup> Hazell (note 131 above).

Finally, there are the issues of Constitutional Court appointments<sup>139</sup> and formal acknowledgement of Legislative Yuan authority. While the nomination criteria was recently changed (4 February 2015), the second appointment criterion for justices on the Constitutional Court previously listed nine years of Legislative Yuan membership as one possible avenue of becoming a justice.<sup>140</sup> Even though it was seldom used throughout the years,<sup>141</sup> and subsequently repealed, the fact this criterion was present since 1947 provides relatively solid footing that experienced members of the legislature, and also the institution itself, possess at least some constitutional interpretative authority.

There is another, less formative, avenue for seasoned politicians with scholarly records to ascend to the Court. Section six states that those with notable scholarly achievement in legal research and with political experience may also become justices.<sup>142</sup> Nominations under this section have produced 17 justices since 1985,<sup>143</sup> although the political experience for many of these candidates usually amounted to being government officials of some sort and not democratically elected members of a legislative body. Nevertheless, it would be wise for future candidates with significant scholarly achievement and elected political experience (that is, Legislative Yuan members, mayors, city council members etc), to receive nominations to the Court.

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<sup>139</sup> Justices are nominated by the President and confirmed by the Legislative Yuan.

<sup>140</sup> (Pre 4 February 2015) Organic Act of the Judicial Yuan, art 4, para 1: ‘... (2). Have served as a Member of the Legislative Yuan for more than nine years with distinguished contributions ...’.

<sup>141</sup> Historically, only one candidate ascended to the bench based on the section two criteria, and that appointment took place nearly 30 years ago (in 1985): Justice Lee Chih-Peng (李志鵬) (1985–1994). For this I am indebted to Institutum Iurisprudentiae, Academia Sinica Assistant Professor Tzung-Mou Wu. See also the IIAS TCC Database (note 10 above).

<sup>142</sup> Organic Act of the Judicial Yuan, art 4, para 1: ‘... (5). Be a person highly reputed in the field of legal research and have political experience’.

<sup>143</sup> IIAS TCC Database (note 10 above). This figure is equal to the nominations from s 1(17) and also s 3(17) during the same time period.

Given the importance of the previous section two and current section six appointment articles, two changes need to occur going forward: (1) more nominations to the Constitutional Court should be made from those with elected political experience in general (preferably from the Legislative Yuan); and (2) the Constitutional Court should formally acknowledge the Legislative Yuan also contains some amount, however limited, of constitutional review powers. As noted above, merely having one branch of government as sole constitutional adjudicators is unhealthy for a fully-functioning democracy.<sup>144</sup> Upholding the constitution involves multiple branches and actors and it is the interplay between these entities that determines a country's constitutional foundation. Acknowledging this would help bridge the wide divide between political and legal constitutionalism in Taiwan, and decrease the inherent problems of the countermajoritarian difficulty.

It should also be emphasised that many of the Court's foundational opinions and expansion of judicial review powers occurred before the Legislative Yuan was fully elected. While it may prove more appropriate to constrain and consolidate the powers of other governmental branches during a period of autocratic leadership, it is quite another to continue to do so when the legislature and the president are democratically elected. Continuing with the precedents and doctrine established in the provincial period, without a thorough re-examination of some major opinions, is troubling and unhealthy to democracy; the reality of an elected legislature passing laws through the will of the people should be fully taken into consideration by the Court.

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<sup>144</sup> And not even one branch, but primarily one division within one branch: the Council of Grand Justices. Lower Taiwanese courts can hear limited constitutional challenges, but they do not have the authority to strike down statutes.

### *C. Barriers to reform*

While at least some reform is necessary in Taiwan, many barriers may prevent it. First, members of the Legislative Yuan may find the above proposals unnecessary. Such are the effects of judicial overhang. Perhaps legislators believe their constitutional review scrutiny already operates at acceptable levels or perhaps they feel that constitutional review does not form part of their remit. This may indeed be the case, given the constitutional and statutory provisions that explicitly state the role of the Judicial Yuan in interpreting the Constitution.<sup>145</sup>

Of course, the above recommendations also contain budget and legislative processes constraints. The introduction of a parliamentary counsel would indeed require necessary appropriations, and the introduction of a constitutional committee would require a significant amount of resources to be allocated. The committee would have to be staffed and worked into the operation of the Legislative Yuan and the practicalities of the constitutional committee and how those would operate would also have to be taken into consideration. Also, some of the ideas may not structurally fit into the Legislative Yuan. Westminster and Congress are both bicameral and Taiwan's legislature is unicameral.<sup>146</sup> Thus, incorporating a constitution committee may prove overly-burdensome for the law-making body, and could potentially delay legislation for various reasons if the committee is overwhelmed or inadequately staffed.

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<sup>145</sup> See notes 73 and 74 above.

<sup>146</sup> Bicameral arrangements may give rise to better constitutional review, especially in upper houses, which are usually 'somewhat removed from the hubbub of daily politics and devoting more attention to the constitutional dimension of legislation': de Visser (note 16 above), p 25.

Finally, barriers may arise because of negative perceptions of Legislative Yuan members. A recent conference held by the Brookings Institution in Washington DC, noted that the fist fights among lawmakers negatively impacted foreign perceptions of the legislature,<sup>147</sup> and during the same conference a member of the policy think-tank Taipei Forum said it was an ‘open secret’ in Taiwan that legislators were ‘weak, lazy and ineffective’.<sup>148</sup> Scholars have even disparaged Taiwanese politicians, calling them ‘outlaw legislators’.<sup>149</sup> These negative perceptions could certainly play a role in the potential expansion (or status quo) regarding the constitutional review authority of the Legislative Yuan.

## V. Conclusion

*Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the lawgiver, to all intents and purposes, and not the person who first wrote or spoke them.*<sup>150</sup>

Some may read this article and say that Taiwan is a young democracy, still attempting to determine its structure and mechanics of constitutional governance. Thus, there is little need to make reforms in regard to legislative interpretative authority and political versus legal constitutionalism. Such arguments are obtuse and irrelevant. These types of discussions are essential, especially in young democracies. If they are left for a later period

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<sup>147</sup> Statement by Richard Bush, ‘Taiwan’s Legislative Yuan: Oversight or Overreach, Brookings Institution’, available at <http://www.brookings.edu/events/2014/06/23-taiwan-legislative-yuan>.

<sup>148</sup> William Lowther, ‘Taipei Forum’s Su Chi denounces “weak, lazy, ineffective” legislature at US forum’, *Taipei Times*, 25 June 2014.

<sup>149</sup> J Martin, ‘Legitimate Force in a Particularistic Democracy: Street Police and Outlaw Legislators in the Republic of China on Taiwan’ (2013) 38(3) *Law & Social Inquiry* 615. However, Martin was mostly referring to local level politicians.

<sup>150</sup> English Bishop Hoadly’s Sermon preached before the King, 31 March 1717, as quoted in Thayer (note 33 above), at 152.



the current overreliance on legal constitutionalism will become even more firmly entrenched, thus diminishing the chances for change at a later date. Further, the changes advocated here in regard to constitutional review are practical and realistic. In fact they are much less dramatic than ‘abolishing judicial review’<sup>151</sup> or even laying out a ‘case against judicial review’,<sup>152</sup> proposed by two very highly respected constitutional law scholars.

Ultimately, Taiwan must address the pitfalls of the countermajoritarian difficulty and judicial overhang and it must confront its over-reliance on legal constitutionalism. This is especially apparent if Taiwan continues with the status quo, allowing the Constitutional Court, as wise, just and respected as they may be, to adjudicate the most important issues of the day. At some point a more perfect balance between legal and political constitutionalism must develop, and there is no reason for the Legislative Yuan to hold back on this for maturity’s sake.

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<sup>151</sup> M Tushnet, ‘Abolishing Judicial Review’ (2010–2011) 27 *Constitutional Commentary* 581.

<sup>152</sup> J Waldron, ‘The Core of the Case Against Judicial Review’ (2006) 115 *Yale Law Journal* 1346.